

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-006678

11/01/2012

HONORABLE KATHERINE COOPER

CLERK OF THE COURT
D. Harding
Deputy

STARFIRE PRODUCTIONS L L C, et al.

CHRISTOPHER A LAVOY

v.

CASTLE VALLEY FILMS L L C, et al.

DALE A DANNEMAN
DAWN L DAUPHINE
ROBERT N MANN
GEOFFREY M STURR

MINUTE ENTRY

The Court has reviewed and considered Defendant Briggs' Motion for Summary Judgment, filed August 5, 2011 which was supplemented on September 27, 2011; and all subsequent responses and replies.

Defendants Briggs move for summary judgment on all claims against them based on:

1. Section 524 of the Bankruptcy Code and the September 23, 2011 Order of Discharge, granting them a discharge of all pre-petition debts, including personal liability for Plaintiffs' claims; and
2. The exclusion, Clause III-5, of the Quarles & Brady, LLP professional liability insurance policy that applies to the time period in this case. This exclusion precludes coverage for a claim resulting in a judgment for fraud or dishonesty.

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It is undisputed that Wendy Briggs was named as a Defendant based on marital community only, that the claims against her have been discharged pursuant to the Order of Discharge, and that the Policy does not cover her. The issue here is whether the Policy covers Mark Briggs for the claims asserted in the Second Amended Complaint. The interpretation of a contract of insurance is a matter of law for the Court.

Pursuant to the Bankruptcy Court's Stay Relief Order, the Briggs are nominal defendants in this action for the purpose of recovering under the Policy. The Order of Discharge is a complete defense to a lawsuit seeking to recover from Defendants personally for pre-petition claims, including any judgment rendered against them in this lawsuit. In addition, a plaintiff cannot sue a discharged debtor to recover under the debtor's insurance policy if the policy does not provide coverage for any judgment against the debtor. *Lyon v. Aguilar*, 2011 WL 488749 (10th Cir. Feb. 11, 2011) (Circuit Court affirmed summary dismissal of claim for which there was no insurance available); and *Hejmanowski v. Bykowicz*, 2010 WL 161446 (W.D.N.Y. Jan. 13, 2010) (Court dismissed all claims because insurance policy provided no primary coverage and plaintiffs could not collect against defendants directly in violation of Section 524).

The Policy states that Illinois law applies. It further states that it will "indemnify, subject to its terms, conditions, exclusions, and limitations, the ASSUREDS in respect of any CLAIM made against the ASSUREDS" (VF SOF ¶ 74.) Clause III-5 of the Policy excludes:

any CLAIM alleging the fraud or dishonesty of any ASSURED, if a judgment or other final adjudication shall establish, or if such ASSURED shall admit, that active and deliberate fraud or dishonesty was committed, or personally acquiesced in, by such ASSURED with actual fraudulent or dishonest purpose or intent.

... Solely for purposes of this Clause III-5 and Clause IV-9, the term "personally acquiesced in" shall mean fraudulently or dishonestly acquiescing in, or remaining passive after having personal knowledge of, fraud or dishonesty prior to or contemporaneously with the time that such fraud or dishonesty occurs....

Plaintiffs' claims allege and/or are based on fraudulent and dishonest conduct. *Illinois State Bar Ass'n Mut. Ins. Co. v. Mondo*, 911 N.E.2d 1144, 1149 (Ill. App. 2009). Count One expressly states a claim for fraud and alleges knowing and intentional fraudulent statements, omissions, and "a conscious and deliberate plan from the beginning to steal the investor funds ... rather than to use the money for producing the movie." Second Amended Complaint ¶¶ 49-58, 53.

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Count Two is a claim for legal malpractice arising from Mr. Briggs' allegedly fraudulent conduct. Plaintiff alleges that Defendant "[e]ntered into fraudulent business transactions with [his] clients" and "[s]tole over \$800,000 out of Valley Films to buy Sugar Daddys." Second Amended Complaint ¶ 64(e)(f). At oral argument, Plaintiffs' counsel stated that a jury could find that Mr. Briggs was simply negligent in providing legal services. What a jury might do does not change the allegations in the Second Amended Complaint or the alleged facts from which those claims arise. There are no allegations of mere negligence against Mark Briggs. He is alleged to have committed malpractice by engaging in intentional, fraudulent conduct.

Count Three is a claim for breach of fiduciary duty that alleges that Briggs breached his fiduciary duties "by, among other things, making numerous false and fraudulent statements, fraudulently misappropriating money and other assets from Plaintiffs, creating numerous false and fraudulent documents, and fraudulently concealing their fraudulent misappropriations." Second Amended Complaint ¶ 71.

Count Four states a claim for conversion, alleging that Mark Briggs engaged in a "plan to steal [Castle Valley's] money, *id.* ¶ 81, and that his "removal of the money was theft, not a loan," *Id.* ¶ 79.

Count Five alleges civil racketeering based on criminal acts of theft and an unlawful scheme to defraud. *Id.* ¶¶ 86-93.

Reading the Second Amended Complaint as a whole, the Court concludes that all of the claims are based on and allege fraudulent and/or dishonest conduct. Under a plain reading of the Policy, these claims are excluded from coverage because they are claims "alleging the fraud or dishonesty" of the covered insured. *See Lexmark*, 761 N.E.2d at 1221.

The Court finds as a matter of law that all of the claims alleged in the Second Amended Complaint are excluded under the "fraud or dishonesty," Clause III-5, exclusion to the Policy. *See Illinois Farmers Ins. Co. v. Preston*, 505 N.E.2d 1343 (Ill. App. 1987) (no coverage under intentional acts exclusion to insurance policy where, regardless of claim, complaint relied on theory of intentional actions). *See also In re Prof'l Bus. Servs. Inc.*, 2007 WL 1227481, at *3 (Bktrcy. W.D. Mo. April 24, 2007) (holding that claim for breach of fiduciary duty is excluded under dishonesty exception to insurance policy).

At oral argument, Plaintiffs requested time to conduct discovery on the "coverage" issue. Plaintiffs did not file a Rule 56(f) motion. Defendants filed this Motion for Summary Judgment in August, 2011. In response to Plaintiffs' claim that Defendants failed to timely disclose the policy, this Court has already ruled that Defendants' disclosure was timely. (Minute entry dated October 26, 2011.) In addition, Plaintiffs have been on notice of the coverage issue because the

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issue has been raised in the Bankruptcy Court proceedings. The discovery cutoff date in this case was April 15, 2011. At no time in the past 18 months have Plaintiffs moved for an extension of that deadline. Plaintiffs' request is denied.

IT IS HEREBY ORDERED granting the Briggs' Defendants Motion for Summary Judgment. The Court finds as a matter of law that the Policy does not afford coverage for any judgment resulting from the claims asserted against Mark Briggs in the Second Amended Complaint, that the Policy does not provide coverage to Wendy Briggs, and that the Order of Discharge bars collection of any judgment from the Briggs personally.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.